SUPREME COURT, U. S.

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No. 1015

IN THE

Supreme Court of the United States

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

PETITIONER'S BRIEF

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INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Question presented	3
Statement of facts	4
Petitioner's motion to limit the jury to determining issue of innocence or guilt	4
Selection of the jury	5
The verdict and judgment	8
Petitioner's post-conviction proceedings	8
Summary of argument	10
Argument	13
I. As a result of the automatic exclusion of veniremen by reason of their abstract views on capital punishment, petitioner was forced to select his jury from a venire which did not represent a fair cross section of the community, and which was partial to the prosecution.	13
A. Pursuant to the Illinois Statute, veniremen were excused for cause solely by reason of their abstract views concerning the death penalty, without a showing that they would not consider or assent to the death penalty.	13

PAGE

B. As a result of the operation of the Illinois statute, petitioner's jury was not chosen from a venire representing a fair cross section of the community as required by the Sixth and Fourteenth Amendments. 17

(1) Reliable public opinion polls demonstrate that petitioner's jury was not selected from a random cross section of the community. 17

(2) The Due Process Clause requires that state court juries be selected from a random cross section of the community. 20

(3) The Equal Protection Clause prohibits invidious distinctions in the selection of state court juries. 22

(4) Cases relating to federal court juries provide guidelines for the type of jury which the Fourteenth Amendment requires the states to provide. 22

(5) The principles expressed by the dissenters in *Fay* v. *New York*, 332 U.S. 261 (1947) are applicable to the case at bar. 25

C. Exclusion for cause of all veniremen having scruples against the death penalty assured the state of a jury whose members were partial to the prosecution on the issue of innocence or guilt, in violation of petitioner's constitutional rights. 28

PAGE

D. As a result of the operation of Section 743, the venire from which petitioner's jury was selected was stripped of persons with moderate and humane views toward punishment, and was comprised of persons who were partial to the prosecution on the penalty phase of the trial. 33

E. Prior federal cases distinguished. 36

II. Even if Section 743 were construed to require the state to establish, as a prerequisite to exclusion for cause, that a venireman's scruples against the death penalty would affect his verdict on the penalty issue, the statute is nevertheless invalid because it deprived petitioner of his constitutional right to have the issue of his innocence or guilt tried by a jury drawn from an impartial cross section of the community. 38

A. Petitioner had a constitutional right to have persons with scruples against the death penalty eligible to serve on the jury which determined his innocence or guilt. 38

B. The double-issue trial procedure established by the Illinois Legislature cannot serve to justify violation of petitioner's constitutional right to an impartial cross section jury. 40

Conclusion 43

Appendix 1 Excerpts from voir dire examination ..App. 1

Appendix 2 Statutory provisions regarding challenges for cause by reason of views concerning the death penalty. .....App. 45

PAGE

Appendix 3 Excerpts from public opinions polls on capital punishment ..... App. 56

Appendix 4 Excerpts from studies of the relationship between attitudes toward capital punishment and "prosecution-proneness" on the issue of guilt or innocence. ..... App. 60

Cases Cited

Atkins v. State, 16 Ark. 568 (1855) 15

Ballard v. United States, 329 U.S. 187 (1946) 19, 23, 24

Boyington v. State, 74 Fla. 258, 76 So. 774 (1917) 15

Brown v. Allen, 344 U.S. 443 (1953) 21

Brown v. Board of Education, 347 U.S. 483 (1954) 32

Chapman v. California, 386 U.S. 18 (1967) 28

Commonwealth v. Ladetto, 349 Mass. 237, 207 N.E.2d 536 (1965) ..... App. 53

Connors v. United States, 158 U.S. 408 (1895) 16

Crawford v. United States, 212 U.S. 183 (1909) 37

Douglas v. California, 372 U.S. 353 (1963) 22, 40

Duncan v. Louisiana, No. 410 20

Fay v. New York, 332 U.S. 261 (1947) 20, 22, 25-27, 29, 33

Frady v. United States, 348 F.2d 84 (D.C. Cir. 1965), cert. denied 382 U.S. 909 35

Gates v. People, 14 Ill. 433 (1853) 14

George v. People, 167 Ill. 447 (1897) 42

PAGE

Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) .. 37

Glasser v. United States, 315 U.S. 60 (1942) 23

Griffin v. Illinois, 351 U.S. 12 (1956) 22, 40

Hampton v. Commonwealth, 190 Va. 531, 58 S.E.2d 288 (1950), cert. denied 339 U.S. 989 ..... App. 55

Hernandez v. Texas, 347 U.S. 475 (1954) 21

Hoyt v. Florida, 368 U.S. 57 (1961) 21

In re Oliver, 333 U.S. 257 (1948) 35

Irvin v. Dowd, 366 U.S. 717 (1961) 17, 20, 29

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), cert. denied 386 U.S. 991 27

Logan v. United States, 144 U.S. 263 (1892) 36-37

Long v. United States, 360 F.2d 829 (D.C. Cir. 1966) .. 15

Manuel v. United States, 254 Fed. 272 (8th Cir. 1918) .. 15

Mapp v. Ohio, 367 U.S. 643 (1961) 23

Mempa v. Rhay, 389 U.S. 128 (1967) 36

Needham v. State, 215 Ark. 935, 224 S.W.2d 785, (1949) ..... App. 51

Parker v. Gladden, 385 U.S. 363 (1966) 20, 29

People v. Fernandez, 301 N.Y. 302, 93 N.E.2d 859 (1950), cert. denied 340 U.S. 914 ..... App. 54

People v. Hobbs, 35 Ill. 2d 263, 220 N.E. 2d 469 (1966), cert. denied 386 U.S. 1024 5

People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), appeal dismissed 358 U.S. 646 ..... App. 51

People v. Stewart, 7 Cal. 140 (1857) 15

Piccott v. State, 116 So. 2d 626 (1959) cert. denied 364 U.S. 293 ..... App. 52

PAGE

Pope v. United States, 372 F.2d 710 (8th Cir. 1967).... 37

Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1902).....App. 54

Smith v. State, 50 Okla. Cr. 282, 114 Pac. 350 (1911) .....App. 54

Smith v. Texas, 311 U.S. 128 (1940) 20-21

Spencer v. Texas, 385 U.S. 554 (1967) 23

State v. Latham, 190 Kan. 411, 375 P. 2d 788 (1962), cert. denied 373 U.S. 919 .....App. 52

State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965) ....App. 51

State v. Owen, 73 Idaho 394, 253 P. 2d 203 (1953) ....App. 52

State v. Pinkston, 336 Mo. 614, 79 S.W. 2d 1046 (1935) .....App. 53

State v. Riley, 126 Wash. 256, 218 Pac. 238 (1923)....App. 55

Strauder v. West Virginia, 100 U.S. 303 (1880) 21, 28

Stratton v. People, 5 Colo. 276 (1880) 15

Swain v. Alabama, 380 U.S. 202 (1965) 14

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)....23-24

Townsend v. Burke, 334 U.S. 736 (1948) 35, 42

Turberville v. United States, 303 F.2d 411 (D.C., Cir. 1962) cert. denied 370 U.S. 946 15

Turner v. Louisiana, 379 U.S. 466 (1965) 20, 22

United States v. Jackson, 262 F.Supp. 716 (D.Conn. 1967), this Court's Docket No. 85 42

United States v. Cornell, 25 Fed. Cases 650 (No. 14,868) (C.C.R.I., 1820) 37, 39

United States v. Dennis, 183 F.2d 201 (2nd Cir. 1950), aff'd. 341 U.S. 494 21

PAGE

United States v. Puff, 211 F.2d 171 (2d Cir. 1954) cert. denied 347 U.S. 963 37

United States v. Wilson, 28 Fed. Cases 699 (No. 16,730) (C.C.Pa. 1830) 37

United States v. Wood, 299 U.S. 123 (1936) 15, 37

United States ex rel. Dukes v. Sain, 297 F.2d 799 (7th Cir. 1962) cert. denied 369 U.S. 868 38

Washington v. Texas, 388 U.S. 14 (1967) 23

Other Authorities Cited

Adorno, et al., "The Authoritarian Personality" (Harper, 1950) 30

Annot., "Beliefs Regarding Capital Punishment As Disqualifying Juror In Capital Case For Cause," 48 A.L.R. 2d 560 (1956) 34

Finkelstein, "The Application of Statistical Decision Theory To The Jury Discrimination Cases," 80 Harv. L. Rev. 338 (1966) 32

Goldberg, "Attitude Toward Capital Punishment and Behavior As A Juror In Simulated Capital Cases" 31-32, 35

Jewel, "The Death Penalty — A Suggestion for California", 36 J.S.B. Calif. 240 (1961) 27

McClelland, "Conscientious Scruples Against the Death Penalty in Pennsylvania," 30 Penn. Bar Ass'n. Quar. 252 (1959) 15

Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?", 39 Texas L. Rev. 545 (May, 1961) 29-30

PAGE

"The Two-Trial System in Capital Cases," 39 N.Y. U.L. Rev. 50 (1964) 42

Wilson, "Belief in Capital Punishment and Jury Performance" 30-31, 35

United States Constitution Cited

Sixth Amendment 2, 10, 22, 25, 29, 36

Fourteenth Amendment 2, 10, 20, 21, 22, 25, 28, 36

Statutes Cited

Ala. Code, Title 30, §57 (1959) ..... App. 45

Ariz. R. Crim. P. 219 (1956) ..... App. 51

Ark. Code Ann. §43-1920 (1964) ..... App. 51

Cal. Penal Code Ann. §1074 (1956) ..... App. 51

Cal. Pen. Code §190.1 (Supp. 1967) 42

Conn. Gen. Stat. Rev. §53-10 (Supp. 1965) 42

Del. Code Ann., Title 11, §3301 (1953) ..... App. 47

Florida Stat. Ann. §932.20 (1944) ..... App. 52

Ga. Code Ann., §59-806 (1965) ..... App. 46

Idaho Code, §19-2020(9) (1948) ..... App. 52

Illinois Criminal Code — 1959 (Ch. 38, Ill. Rev. Stat. 1959):

Section 360 ..... 2, 33

Section 743 ..... 2, 5, 10, 13, 14, 18, 19, 22, 36, 39

Section 801 ..... 2, 4, 10, 42

Illinois Criminal Code — 1967 (Ch. 38, Ill. Rev. Stat., 1967):

Section 1-7(c)(1) 4

Section 115-4(d) 5

PAGE

Ind. Ann. Stat. §9-1504 (1956) ..... App. 47

Kan. Gen. Stat. Ann. §62-1404, 1405 (1964) ..... App. 52

La. Code Crim. P., Art. 798 (1966) ..... App. 46

Mass. Gen. Laws Ann., Ch. 278, §3 (1956) ..... App. 53

Minn. Stat. Ann., §631.31 (1947) ..... App. 48

Mo. Rev. Stat. Ann., §546.130 (1953) ..... App. 53

Mont. Rev. Codes Ann. §95-1909(d)(2) (1967) ..... App. 48

Neb. Rev. Stat., §29-2006 (1964) ..... App. 54

N. Y. Code Crim. P. §377 (Supp. 1967) ..... App. 54

N. Y. Pen. Code §125.35 (1967) 42

N. D. Cent. Code Ann., §29-17-36 (1960) ..... App. 49

Ohio Rev. Code Ann. §2945.25 (1954) ..... App. 49

Okl. Stat. Ann., Title 22, §660 (1937) ..... App. 54

Pa. Stat. Ann. Title 18, §4701 (1963) 42

S. D. Code, §34.3618 (Supp. 1960) ..... App. 49

Tex. Code Crim. P. Ann., Art. 35.16 (1966) ..... App. 46

Tex. Code Crim. P., Art. 37.07 (Supp. 1967) 42

Utah Code Ann. §77-30-19 (1953) ..... App. 50

Va. Code Ann. §19.1-210 (1960) ..... App. 55

Wash. Rev. Code Ann., §10.49.050 (1961) ..... App. 55

Wyo. Stat. Ann. §7-224 (1957) ..... App. 50

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PETITIONER'S BRIEF

Opinion Below

The opinion of the Supreme Court of Illinois is reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois was entered on January 19, 1967. A petition for rehearing was denied on March 27, 1967, and the judgment became final on that date. Writ of certiorari was granted on January 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State . . . wherein the crime shall have been committed. . . . "

The Fourteenth Amendment to the United States Constitution provides in part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 360 of the Illinois Criminal Code (Ch. 38, § 360, Ill. Rev. Stat. 1959) provided:

> "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959), the statute here in question, provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

Section 801 of the Illinois Criminal Code (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided in pertinent part:

> "In all cases where any person . . . shall be charged with . . . murder . . . and the case shall be tried by a jury and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment. . . . In all cases tried by the court without a jury, on a plea

of not guilty or on a plea of guilty, for the purpose of determining the duration of imprisonment the court may, after conviction of the person, consider the evidence, if any, received upon the trial, and any other evidence offered as to aggravation and mitigation of the offense, and may also hear and receive evidence as to the moral character, life, family, occupation, and criminal record, if any, of such person so convicted. . . ."

Question Presented

Whether the operation of the Illinois statute providing that the state could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived the petitioner of a jury which fairly represented a cross section of the community, and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

In October 1959, petitioner was indicted for the murder of a Chicago policeman. (A. 1-3.)* Since petitioner was indigent, counsel was appointed to represent him.

Under an Illinois statute in effect at the time of petitioner's trial (Ch. 38, § 801, Ill. Rev. Stat. 1959), if a defendant indicted for murder exercised his right to be tried by a jury (Illinois Constitution, Art. II, § 5), the jury fixed the punishment in the event the defendant was found guilty. The punishment thus fixed could not be altered by the trial judge.**

Petitioner's Motion To Limit the Jury To Determining Issue of Innocence Or Guilt.

Prior to trial, petitioner's counsel filed a motion for the entry of an order directing that the jury decide only the issue of whether petitioner was innocent or guilty of the crime charged in the indictment, and that no issue or form

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* "A." refers to the printed abstract filed in the Supreme Court of Illinois on petitioner's original appeal (No. 36277). "R." refers to the transcript of petitioner's trial, not printed. "Abst." refers to the printed abstract filed in the Supreme Court of Illinois on this appeal (No. 39387). "App." refers to the various appendices to this brief.

** In 1961, this statute was replaced by another (still in effect) which authorizes the jury in murder cases to return a verdict of death in the event the defendant is found guilty, but this verdict is not binding on the trial judge. The jury no longer returns verdicts as to the number of years of imprisonment to be served by defendants who are found guilty. (Ch. 38, § 1-7(c)(1), Ill. Rev. Stat. 1967.)

of verdict be presented to the jury regarding the sentence to be imposed upon petitioner in the event he was found guilty. (R. 70-71.) This motion was denied. (R. 74.)

Selection of the Jury

Ninety-six persons were questioned during the course of the selection of the jury. Of these, 47, or approximately 49% of those examined, were excused for cause at the request of the state pursuant to Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959) which provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *

Although in a few instances the form of the question varied, the vast majority of veniremen were excused on the basis of an affirmative answer to the question "Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?" Early in the selection process the judge interrupted the State's Attorney, who had been asking preliminary questions before getting to the usual question on opposition to the death penalty; the judge said, "Let's get these

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* This statute was repealed in 1961, and was replaced by a statute which provides simply that "Each party may challenge jurors for cause." (Ch. 38, § 115-4(d), Ill. Rev. Stat. 1967.) The Illinois Supreme Court has held that in murder cases in which the death penalty is sought by the state, this statutory change did not affect the state's right to challenge for cause veniremen who have conscientious scruples against imposition of the death penalty. *People* v. *Hobbs*, 35 Ill.2d 263, 274, 220 N.E.2d 469, 475 (1966), cert. denied 386 U.S. 1024.

conscientious objectors out of the way, without wasting any time on them. Ask him that question first." (App. 1, p. 6.) Thereafter, in most instances the "death penalty question" was asked before or immediately after the prospective juror's name and address were established. All jurors who admitted to any scruples against or opposition to the death penalty were excused for cause.

Most of the "death penalty" challenges for cause were based upon inadequate and superficial inquiry. Of the 47 veniremen excused by reason of their scruples against the death penalty, 26 were removed after they had answered one or two questions put to them by the trial judge concerning the death penalty, without even giving their names and addresses. (Add. 1, pp. 16, 18, 21-30.) Another five prospective jurors, having raised their hands in response to a general question put by the trial judge, were excused *en masse* without having answered a single question. (App. 1, p. 15.)

The following statistics appear from the record with respect to the 96 veniremen examined:

> Two stated that they did not "believe" in capital punishment, and were thereupon excused for cause. (App. 1, pp. 8-9, 29.)
>
> One stated that while he did not have any religious or conscientious scruples against infliction of the death penalty in a proper case, he did not "believe in the death penalty" and "wouldn't want to be responsible for putting— [at this point he was interrupted by the trial judge who said "None of us do."]—deciding somebody should be put to death." The venireman was excused for cause. (App. 1, pp. 35-36.)

Ten were excused for cause after stating that they had religious or conscientious scruples against the infliction of the death penalty. (App. 1, pp. 14-16, 23, 43.)

Twenty-nine were excused for cause after they stated that they had conscientious or religious scruples against infliction of the death penalty "in a proper case." (App. 1, pp. 5, 7, 9, 12-13, 15-16, 18, 21-31, 33, 42.)

Only five veniremen stated that their scruples against infliction of the death penalty would actually prevent them from imposing the death penalty under any circumstances if petitioner were found guilty. (App. 1, pp. 1-2, 8, 10-11, 37-38, 40-41.)

None stated that his views on capital punishment would affect his ability to render a fair verdict on the primary issue of petitioner's innocence or guilt of the crime charged.

Forty-nine stated or indicated by silence that they did not have a religious or a conscientious scruple against the infliction of the death penalty. Of these, 38 said that if the defendant were found guilty of murder and they were convinced that the proper penalty under the law and the evidence was that of "death in the chair," they would return a verdict of guilty and fix the penalty at "death in the chair." (App. 1, pp. 314, 17-18, 20-26, 28-44.)

The pertinent quotations from the *voir dire* examination are set forth in Appendix 1 to this brief.

The Verdict and Judgment

On April 20, 1960, the jury returned its verdict finding petitioner guilty of murder and fixing punishment at death. (A. 220.) On April 25, 1960, judgment was entered on the verdict, whereupon petitioner's court appointed attorneys were given leave to withdraw. (A. 220-222.)

Petitioner's Post-Conviction Proceedings

Through newly appointed counsel, petitioner appealed to the Supreme Court of Illinois. The judgment of conviction and the sentence were affirmed. (27 Ill.2d 483, Mar. 25, 1963, rehearing denied May 22, 1963). The counsel appointed to represent petitioner in the Supreme Court of Illinois withdrew, and new counsel was not appointed on his behalf until after the time for petitioning this Court for writ of certiorari had expired.

Thereafter, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. In November, 1963 the petition was dismissed without prejudice, on the ground that petitioner had not yet exhausted his state court remedies. Petitioner then filed a petition under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 826-832, Ill. Rev. Stat. 1961). The petition was dismissed by the trial court, and the Supreme Court of Illinois denied petitioner's petition for writ of error. (Unpublished opinion No. 3559, Jan. 17, 1964.) The Illinois Supreme Court also denied petitioner leave to file an original petition for writ of habeas corpus.

Petitioner thereupon filed a motion to reinstate his previously dismissed federal petition for writ of habeas corpus. In May, 1964, the federal district judge ruled that petitioner had been deprived of his constitutional rights

because the jury which determined his guilt had also passed upon his sentence. The case was remanded to the state court for resentencing. The Court of Appeals for the Seventh Circuit reversed the order, and remanded with directions to dismiss the petition. (337 F.2d 427, 7th Cir., Sept. 28, 1964.) This Court denied petitioner's petition for writ of certiorari. (379 U.S. 950, Dec. 14, 1964.)

In February 1965, newly appointed counsel for petitioner filed a petition in the Circuit Court of Cook County, Criminal Division, which has given rise to the present proceedings. (Abst. 2-14.) In this petition, petitioner argued (*inter alia*) that his constitutional rights were denied him because the trial court excused for cause prospective jurors having scruples against capital punishment, and because the trial judge permitted the jury to fix the penalty as well as to determine issues of guilt or innocence. In March 1965, the trial court denied the state's motion to strike the petition for want of jurisdiction. (Abst. 64.) In April 1965, the trial court, on its own motion, denied petitioner's request to introduce evidence in support of his petition, and dismissed the petition (as amended). (Abst. 60, 62-64, 69.) On direct appeal to the Supreme Court of Illinois, the trial court's dismissal was affirmed (36 Ill. 2d 471, Jan. 19, 1967, rehearing denied Mar. 27, 1967). The court considered and rejected petitioner's contention that his constitutional rights had been violated by reason of the disqualification for cause of jurors having scruples against imposition of the death penalty. (36 Ill. 2d at 475-6.)

On January 15, 1968, this Court granted petitioner's petition for a writ of certiorari limited to the question set forth above.

Petitioner's execution has been stayed by order of the Illinois Supreme Court pending the outcome of this proceeding.

Summary of Argument

Part I

The Illinois statute in effect at the time of petitioner's trial provided that in murder cases where the defendant was tried by jury, the degree of punishment to be assessed in the event of a finding of guilty was to be determined at the same time and by the same jury which decided the defendant's guilt. (Ill. Rev. Stat. 1959, ch. 38, §801.) Illinois law also provided (Ill. Rev. Stat. 1959, ch. 38 §743):

> "In trials for murder it shall be a cause for challenge of any juror, who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

Pursuant to Section 743, 47 jurors, constituting 49% of all jurors examined on *voir dire,* were excused for cause because of their abstract views on capital punishment, without a showing in any case that those views would affect the veniremen's deliberations on the issue of petitioner's innocence or guilt, and without a showing in most cases that those views would have prevented them from considering imposition of the death penalty if petitioner were found guilty. (Part I A, pp. 13 to 16 below.)

This unjustified exclusion of prospective jurors deprived petitioner of rights guaranteed him under the jury trial provisions of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the following reasons:

> *First,* reliable public opinion polls show, and the record in this case confirms, that fully half the people in the United States oppose capital punishment. Exclusion of those persons from the venire deprived petitioner of a jury selected from a fair and full cross-

section of the community, particularly since it served to exclude a disproportionately high percentage of citizens from certain distinguishable racial, social and economic groups, such as Negroes, women, Democrats and persons in lower income brackets (Part I B, pp. 17 to 28 below);

Second, valid and undisputed scientific studies show, as practicing lawyers have long known, that a jury composed of persons who have no scruples against capital punishment is partial to the prosecution on the issue of innocence or guilt, and is therefore more likely to find the defendant guilty than a jury from which scrupled jurors are not excluded. The Illinois statute thus operated to assure the prosecution of a jury which was biased in its favor on the crucial threshold issue of petitioner's innocence or guilt (Part I C, pp. 28 to 33 below); and

Third, common sense as well as recent scientific surveys demonstrate that jurors who favor capital punishment are more likely, in deciding the penalty issue, to impose the death penalty or a long term of imprisonment than jurors who oppose capital punishment. Thus, the Illinois statute assured the prosecution of a jury which tended to mete out far more severe penalties than would a jury selected from the community as a whole (Part I D, pp. 33 to 36 below).

Part II

The constitutional defects in the Illinois statute which are specified in Part I cannot be cured by holding that the state must demonstrate that a prospective juror's scruples against capital punishment will prevent him from considering imposition of the death penalty if the defen-

dant is found guilty. Petitioner was entitled to have persons sit on his jury and determine the primary issue of innocence or guilt even though those persons would refuse to consider imposition of the death penalty if petitioner were found guilty. Otherwise, the jury which tries the innocence-guilt issue will suffer from two of the three defects set forth in Part I, namely:

> *First*, the venire will not represent a fair and full cross-section of the community; and
>
> *Second*, the venire will be made up of persons who are partial to the prosecution on the crucial issue of guilt or innocence. (Part II A, pp. 38 to 40 below.)

The state may not deprive petitioner of his right to have scrupled persons sit on his jury by establishing a single-trial, double-issue procedure. So long as the state persists in that procedure, it must forego challenges for cause of scrupled jurors so that all defendants are afforded trial of the innocence-guilt issue before an impartial cross-section jury.

No irreconcilable conflict exists between the rights of the petitioner and the interest of the state. The dilemma created by the double-issue procedure can be obviated either by placing the penalty fixing power in the hands of the judge, as Illinois has done in all non-capital cases, or by adopting a system of bifurcated jury trials. (Part II B, pp. 40 to 43 below.)

ARGUMENT

I.

AS A RESULT OF THE AUTOMATIC EXCLUSION OF VENIREMEN BY REASON OF THEIR ABSTRACT VIEWS ON CAPITAL PUNISHMENT, PETITIONER WAS FORCED TO SELECT HIS JURY FROM A VENIRE WHICH DID NOT REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY, AND WHICH WAS PARTIAL TO THE PROSECUTION.

A.

Pursuant To The Illinois Statute, Veniremen Were Excused For Cause Solely By Reason of Their Abstract Views Concerning the Death Penalty, Without A Showing That They Would Not Consider Or Assent To the Death Penalty.

The plain language of Section 743 authorizes exclusion for cause of veniremen solely by reason of their scruples against or opposition to the death penalty. The statute does not require the state to demonstrate that the veniremen's views would prevent their considering the death penalty in the event the defendant were found guilty, or would otherwise result in bias against the state or in favor of the defendant. The statutory exclusion for cause thus fails to make provision for persons who oppose or who have conscientious scruples against the death penalty, but who nevertheless will follow the trial judge's instructions to consider signing a death verdict if the defendant is found guilty.*

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* One of the scientific surveys referred to below discloses that many persons who state that they oppose or have scruples against the death penalty nevertheless will assent to capital punishment when presented with the facts of particular cases. See Appendix 4, page 67.

Although 47 veniremen were excused for cause, in only 5 instances was inquiry made to determine whether their abstract views concerning capital punishment would prevent consideration of the death penalty under any circumstances. Thus, the judge excused for cause every venireman who stated that he did not "believe in capital punishment" or who answered "yes" when asked, "Do you have any religious or conscientious scruples against infliction of the death penalty?" or "Do you have any religious or conscientious scruples against infliction of the death penalty in a proper case." These questions were woefully inadequate to test whether the prospective juror's theoretical views would prevent him from considering all forms of penalty verdicts in the event petitioner was found guilty. Use of the amorphous tautology, "in a proper case," confused rather than elucidated the crucial distinction.

The vague and general questions which served as the basis for disqualification in the case at bar are the antithesis of the "narrowly specified, provable and legally cognizable basis of partiality" which this Court has said forms the basis for challenges for cause. *Swain* v. *Alabama*, 380 U.S. 202, 220 (1965).

Prior to the enactment of Section 743, the Illinois Supreme Court recognized the need for a showing of a connection between a venireman's scruples against the death penalty and his ability to consider all forms of verdict. *Gates* v. *People*, 14 Ill. 433, 434-5 (1853). This requirement was legislatively overturned by the passage in 1869 of Section 743. (Ill. Laws 1869 at 11, § 4.)

Several courts have held (as did the Illinois court in *Gates*) that prospective jurors may not be excluded for cause unless and until it is shown that their views on capital

punishment will preclude them from considering the death penalty if the defendant is found guilty. These cases expressly or implicitly reject the assumption that theoretical opposition to capital punishment, in and of itself, affords a basis for disqualifying veniremen for cause.*

United States v. *Wood*, 299 U.S. 123 (1936), is analogous. This Court held that federal employees are not automatically subject to challenge for cause in cases involving the federal government, and that a showing of actual bias is a predicate to the challenge (299 U.S. at 149):

> ". . . . We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."

Applying this principle to the case at bar, there can be no rational basis for a conclusive presumption of "implied bias" ("a bias attributable in law to the prospective juror regardless of actual partiality", 299 U.S. at 134) arising

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* *E.g.*, *People* v. *Stewart*, 7 Cal. 140, 143-4 (1857) (error to exclude venireman because he was "opposed to capital punishment on principle"); *Atkins* v. *State*, 16 Ark. 568, 580 (1855) (error to exclude juror who is "opposed to capital punishment"); *Stratton* v. *People*, 5 Colo. 276, 279 (1880) ("Conscientious scruples, to disqualify, must be such as to preclude a finding of guilty in accordance with the law and the evidence"). In *Turberville* v. *United States*, 303 F.2d 411 (D.C. Cir. 1962), cert. denied 370 U.S. 946, the Court of Appeals directed trial judges henceforth to inquire "not merely whether they [veniremen] are opposed to the death penalty but also, if opposed, whether this private sentiment would prevent them from rendering a fair verdict on the basis of the evidence." *Long* v. *United States*, 360 F.2d 829, 834 (D.C. Cir. 1966). See also *Manuel* v. *United States*, 254 Fed. 272, 274 (8th Cir. 1918); *Boyington* v. *State*, 74 Fla. 258, 76 So. 774, 775 (1917); McClelland, "Conscientious Scruples Against the Death Penalty in Pennsylvania," 30 Penn. Bar Ass'n. Quar. 252 (1959).

from conscientious scruples against infliction of the death penalty.

In *Connors* v. *United States*, 158 U.S. 408 (1895), this Court held that questions concerning the political beliefs of prospective jurors were improper in the absence of a showing that those beliefs would prevent the jurors from acting impartially. (158 U.S. at 412-5.)

Most state statutes on this subject expressly require a showing that the venireman's abstract opposition to capital punishment will prevent him either from finding the defendant guilty or from considering imposition of the death penalty if the defendant is found guilty. Only five states—Illinois, Georgia, Louisiana, Alabama and Texas—have enacted statutes which permit exclusion for views alone, unrelated to consideration of the verdict. The statutes are collected in Appendix 2 to this brief.

There is no rational foundation for the unspoken assumption contained in the Illinois statute that the venireman's scruples will necessarily prevent him from according a fair hearing to the state on the penalty issue.

The automatic disqualification of veniremen who in principle opposed the death penalty resulted in three violations of petitioner's rights under the United States Constitution:

—Petitioner's jury was not selected from a full, random cross section of the community (Part B, pages 17 to 28 below);

—Those who remained eligible to serve on the jury were partial to the prosecution on the primary issue of petitioner's innocence or guilt. (Part C, pages 28 to 33 below); and

—The eligible jurors represented a segment of the community which tends to mete out more severe punishments than the excluded veniremen (Part D, pages 33 to 36 below.)

B.

As a Result of the Operation of the Illinois Statute, Petitioner's Jury Was Not Chosen From a Venire Representative of a Fair Cross-Section of the Community As Required By the Sixth and Fourteenth Amendments.

(1)

RELIABLE PUBLIC OPINION POLLS DEMONSTRATE THAT PETITIONER'S JURY WAS NOT SELECTED FROM A RANDOM CROSS SECTION OF THE COMMUNITY.

Authoritative public opinion polls, summarized in Appendix 3 to this brief, disclose that approximately one-half of the adults in this country are opposed to capital punishment. A 1958 Roper poll shows 50% opposed, 42% in favor, and 8% no opinion. A more recent (1966) Gallup poll shows 47% opposed, 42% in favor and 11% no opinion. These percentages are substantiated by the experience in the case at bar, in which approximately 49% of the veniremen were excused for cause because of their theoretical opposition to the denth penalty.*

Thus, a substantial portion of the community was eliminated for abstract opinions on matters of public concern without any showing that these opinions would affect their ability to try the case fairly. The operation of Section 743

* Similarly, in *Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961), over half of the prospective jurors who did not have fixed opinions on the defendant's guilt were challenged for cause by reason of their opposition to the death penalty.

thereby deprived petitioner of a jury chosen from a venire fairly representing a cross-section of the community.

The challenge for cause authorized by Section 743 had the further effect of altering the representation of certain recognized segments of the community on the venire from which the jury was chosen by excluding disproportionately large numbers of certain classes of persons.

Thus, the Roper survey reveals that, while 50% of the total sample opposed capital punishment, 78% of the Negroes polled were in the opposition group. (App. 3, p. 55.) While Roper does not reveal the number of persons of each race questioned, it necessarily follows that among the non-Negroes polled, less than 50% were opposed. Hence, a jury composed only of those who express no opposition to capital punishment is likely to include a substantially smaller percentage of Negroes than either (i) a fair cross-section of the community, or (ii) a jury from which persons opposed to capital punishment have not been automatically excluded.

Similarly, the polls reveal that qualifying a jury for capital punishment has a tendency toward excluding women. In 1966, Lou Harris and Associates, Inc. found that 55% of all persons of both sexes who expressed an opinion were opposed to capital punishment. But among the women polled, 62% were opposed to the death penalty and 38% were in favor. (App. 3, p. 58.) The Harris results are confirmed by Gallup. (App. 3, p. 56.)

Economics are also a factor. Roper finds significantly greater opposition to capital punishment in the lower income brackets. (App. 3, p. 55.) This is confirmed by Gallup, who found that persons with incomes over $7,000

per year were almost equally divided between opponents and proponents of the death penalty, while among those with incomes under $7,000, a substantial majority of those who expressed an opinion were opposed to capital punishment. (App. 3, p. 57.)

Harris also found that city dwellers opposed capital punishment 46% to 33%, with 17% undecided, while suburbanites favored it in almost inverse ratio, 48% to 37%, with 15% undecided. (App. 3, p. 58.)

The political point of view of persons opposed to capital punishment is also a significant factor, since political predisposition shows a general mode of thinking, the type of "imponderable" which the cross-section principle is intended to take into consideration. See *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946), discussed at page 24 below. The Gallup Poll indicates that the operation of Section 743 tends to exclude Democratic and independent voters, and to include Republicans. (App. 3, p. 57.)

From the foregoing summary it becomes clear that the persons excluded by Section 743 were most likely to be females, Democrats, Negroes, and persons from the lower economic bracket, or combinations thereof. The remaining veniremen, from whom petitioner's jury was drawn, were likely to be white, male, Republican and persons from the upper income groups. It is obvious, therefore, that petitioner was not afforded an opportunity to select the jury from a venire composed of a full, fair and random cross-section of the community.

We do not contend that the Illinois statute was deliberately designed for the purpose of excluding Negroes, Democrats, women, or persons in the lower economic groups from juries. But the practical effect of the oper-

ation of the statute was to exclude such disproportionate percentages of these groups that petitioner was denied his constitutionally protected right to a jury composed of a fair cross-section of the community.

(2)

THE DUE PROCESS CLAUSE REQUIRES THAT STATE COURT JURIES BE SELECTED FROM A RANDOM CROSS SECTION OF THE COMMUNTY.

This Court has held that a fair trial requires an impartial or neutral jury. *Parker* v. *Gladden,* 385 U.S. 363, 364 (1966); *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961); *Fay* v. *New York,* 332 U.S. 261, 288-89 (1947). We submit that this Court should now hold that the United States Constitution requires not only lack of bias or prejudice in the particular case, but also that the jury be chosen from a venire fairly representative of a cross-section of the community. On several occasions, in *dicta,* this Court has indicated that the Due Process Clause of the Fourteenth Amendment imposes this requirement upon those states, such as Illinois, which provide jury trials in criminal cases. (Illinois Constitution Art. II, § 5.) The issue here is not whether the Constitution requires the states to afford a jury trial in all criminal cases (see *Duncan* v. *Louisiana,* No. 410). "The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. . . ." *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965).

In *Smith* v. *Texas,* 311 U.S. 128, 130 (1940), this Court said:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

In *Brown* v. *Allen,* 344 U.S. 443, 474 (1953) this Court said that the Due Process Clause requires that state-court juries be selected from a source which "reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." This salutary principle has often been applied by this Court in voiding state jury selection procedures which purposefully exclude persons by reason of their race or national origin. *Strauder* v. *West Virginia,* 100 U.S. 303, 308-10, (1880); *Hernandez* v. *Texas,* 347 U.S. 475, 481-2 (1954).

In *dicta* in *Hoyt* v. *Florida,* 368 U.S. 57, 59-60 (1961), this Court stated:

> " . . . the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which 'single out' any class of persons 'for different treatment not based on some reasonable classification.' *Hernandez v. Texas,* 347 U.S. 475, 478."

The Due Process Clause does not require a jury which is whitewashed of all opinions and sentiments which might subtly influence the verdict. But it does require that the jury be selected in such a way as to insure that the opinions and sentiments current in the community are fairly balanced, so long as those views will not give rise to actual, demonstrable bias to one side or the other. As indicated by Judge Learned Hand, this means that the venire is to be a *random* sample of the *community as a whole. United States* v. *Dennis,* 183 F.2d 201, 224 (2d Cir. 1950); aff'd. 341 U.S. 494 (1951).

Where, as is the case under Section 743, a substantial segment of the community is arbitrarily excluded without any showing of actual bias or prejudice in the particular case, the requirements of the Due Process Clause have not been met.

(3)

THE EQUAL PROTECTION CLAUSE PROHIBITS INVIDIOUS DISTINCTIONS IN THE SELECTION OF STATE COURT JURIES.

Section 743 runs afoul of the Equal Protection Clause as well as the Due Process Clause. Section 743 applied only in murder cases and then only when the prosecutor "qualified" the jury for capital punishment. In all other criminal cases, persons were qualified to serve on juries without regard to their views on capital punishment.

A state may not vest unfettered discretion in its prosecutors to determine which defendants shall receive trial by cross-section juries and which shall not. All defendants charged with the same type of offense are entitled to the same kind of trial. *Fay* v. *New York,* 332 U.S. 261, 285 (1947). Nor should the representative character of the jury vary with or depend upon the crime charged.

Since Illinois provides a jury trial to all criminal defendants, it cannot arbitrarily deprive some defendants of a jury chosen from a fair cross-section of the community. Cf. *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965); *Douglas* v. *California,* 372 U.S. 353, 356-57 (1963); *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956).

(4)

CASES RELATING TO FEDERAL COURT JURIES PROVIDE GUIDELINES FOR THE TYPE OF JURY WHICH THE FOURTEENTH AMENDMENT REQUIRES THE STATES TO PROVIDE.

In several cases dealing with federal courts, this Court has held that juries must be selected from a random and

fair cross section of the community. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Ballard* v. *United States*, 329 U.S. 187 (1946); *Glasser* v. *United States*, 315 U.S. 60 (1942), discussed below. Cases such as these, in which this Court has exercised its supervisory power over trials in federal courts, have frequently been held to provide guidelines for the due process requirements applicable to the states. See, for example, *Washington* v. *Texas*, 388 U.S. 14, 22 (1967); *Spencer* v. *Texas*, 385 U.S. 554, 572-74 (1967) (separate opinion of Chief Justice Warren); *Mapp* v. *Ohio*, 367 U.S. 643, 654-57 (1961).

In *Glasser* v. *United States*, 315 U.S. 60 (1942) this Court dealt with selection of federal court juries, but used language applicable as well to jury selection procedures in state courts (315 U.S. at 86):

> ". . . our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. . . . Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

Discussing federal juries in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946), this Court said:

> "The American tradition of trial by jury, considered in connection with either criminal or civil pro-

ceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.' "

Also analogous to the issue presented here is *Ballard* v. *United States*, 329 U.S. 187 (1946), involving exclusion of females from federal court juries. The government argued that an all-male panel would be just as representative of the community as a panel which included women. This Court held that women carry to the jury-room a unique viewpoint which the defendant is entitled to have represented on the jury (329 U.S. at 193-94):

> "... it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."

So too, even if the persons who oppose the death penalty cannot be shown to act as a class, or have any distinguishing characteristics other than their views on the death penalty, these persons are entitled to sit on juries in capital cases, and petitioner is entitled to have his jury drawn from a cross-section which includes them. Exclusion for their theoretical views alone, unrelated to their actual ability to be fair to both the prosecution and defense, is just as senseless as exclusion by reason of sex. And if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all persons *favoring* capital punishment were intentionally and systematically excluded from jury service in murder cases?

(5)

THE PRINCIPLES EXPRESSED BY THE DISSENTERS IN FAY v. NEW YORK, 332 U.S. 261 (1947) ARE APPLICABLE TO THE CASE AT BAR.

In *Fay* v. *New York*, 332 U.S. 261 (1947), the New York "blue ribbon" jury system was challenged on the ground that its practical result was to exclude a disproportionate number of persons in certain socio-economic groups and thus deprive the defendant of a jury drawn from a cross-section of the community. In many respects the problems presented in *Fay* are similar to those in the case at bar.

A majority of the Court in *Fay* held that the state's manner of selecting veniremen for the blue ribbon juries was not so unfair or prejudicial to defendants that it violated the Fourteenth Amendment. The majority refused to apply the Sixth Amendment jury trial provisions to the states. (332 U.S. at 283-8.) The majority also held that the Fourteenth Amendment does not require state-court juries to have proportional representation of persons from lower income groups. (332 U.S. at 291-2.) But the majority agreed that "a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process . . .. The defendant's right is a neutral jury." (332 U.S. at 288-9.)

The majority's views as to the meaning and effect of the proof affords a sound basis for distinguishing the majority opinion in *Fay*. The dissenters, however, viewed the record as reflecting the kinds of groundless discriminations which petitioner complains of in the case at bar. Accordingly, petitioner submits that Mr. Justice Murphy's dissenting opinion in *Fay*, joined by Justices

Black, Douglas and Rutledge, eloquently expresses the principles which should be applied in this case (332 U.S. at 296, 299-300):

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community.
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> • • •
>
> ". . . The proof here is adequate enough to demonstrate that this panel . . . suffers from a constitutional infirmity. That infirmity is the denial of equal protection to those who are tried by a jury drawn from a 'blue ribbon' panel. Such a panel is narrower and different from that used in forming juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by 'blue ribbon' juries receive unequal protection.
>
> ". . . there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. . . . [The jury] is a democratic institution, representative of all qualified classes of people. *Smith* v. *Texas, supra* [311 U.S. 120 (1940)]. To the extent that a 'blue ribbon' panel fails to reflect this democratic principle, it is constitutionally defective.
>
> "The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. . . . But it is no less real or meaning-

> ful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. . . ."

See also *Labat* v. *Bennett*, 365 F.2d 698, 724-5 (5th Cir. 1966), cert. denied 386 U.S. 991.

Almost 50% of the population was excluded from petitioner's jury because of abstract views on capital punishment, (i) without any showing that the jurors thus excluded could not be fair to the state on the issues to be presented in the case, (ii) thus excluding a disproportionate segment of certain recognizable racial, social and economic groups. It is as though all those who agree with this Court's recent decisions on police interrogation were excused for cause by the prosecution. The veniremen's viewpoints on subjects of current concern and interest cannot serve to disqualify them from the jury. And if prospective jurors are disqualified for cause by reason of their abstract opinions, the remaining veniremen cannot be deemed fairly representative of a cross section of the community.* Here, fully one-half of the community was excluded by reason of abstract views on a current and controversial topic. Since there was no rational foundation for this exclusion, the operation of the Illinois statute deprived petitioner of his right under the United States

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* "It seems unreasonable to expect that mature persons will not have considered these broad social questions until they became jurors. It seems unjust to hold that one conscientious group which has considered and concluded in favor of the death penalty is fit to serve as jurors while an equally conscientious group having concluded against the death penalty is unfit." Jewel, "The Death Penalty—A Suggestion for California", 36 J.S.B. Calif. 240 (1961).

Constitution to be tried by a jury chosen from a cross-section of the community.

Since exclusion of a major class of persons from the jury deprived petitioner of the fair and representative cross-section of the community to which he was entitled, it is unnecessary to show that the persons remaining on the panel were partial to the prosecution or could not render a fair verdict. The long line of jury discrimination cases, beginning with *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), all recognize that if a class has unlawfully been excluded from the jury, a new trial is required, without reference to the composition or apparent fairness of the venire or of the jury which actually tried the case. This Court has emphasized that where federal constitutional rights are involved, a reasonable possibility of prejudice alone is sufficient to warrant reversal of a criminal conviction. *Chapman* v. *California*, 386 U.S. 18, 22-24 (1967).

Accordingly, the arguments concerning "prosecution proneness," presented in Parts C and D below are independent of and in addition to the contentions presented above concerning a representative cross-section jury. Adoption of any of these positions should result in reversal of petitioner's conviction.

C.

Exclusion For Cause of All Veniremen Having Scruples Against the Death Penalty Assured the State of a Jury Whose Members Were Partial To the Prosecution on the Issue of Innocence or Guilt, In Violation of Petitioner's Constitutional Rights.

This Court has recognized that the Due Process Clause of the Fourteenth Amendment assures state court defen-

dants of trial before "a neutral jury." *Fay* v. *New York*, 332 U.S. 261, 288-9 (1947). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The command of the Sixth Amendment that the jury be "impartial" is applicable to the states. *Parker* v. *Gladden*, 385 U.S. 363, 364 (1966).

The exclusion of all persons having scruples against infliction of the death penalty necessarily results in a jury none of whose members has such scruples. Recent scientific studies have confirmed what experienced prosecutors and defense lawyers have known all along: *persons having no scruples against the death penalty tend to favor the prosecution on the issue of innocence or guilt.* They are more likely to find the defendant guilty than those who entertain reservations about infliction of the death penalty. The two classes are not fungible where the innocence-guilt issue is involved, and the difference works to the decided advantage of the state.

In 1961, Professor Walter E. Oberer, writing in the Texas Law Review, pointed out that the exclusion of scrupled jurors in capital cases results in a jury which is more favorable to the prosecution on the question of innocence or guilt than a jury selected from the community as a whole. Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?" 39 Texas L. Rev. 545 1961). Professor Oberer stated (39 Tex. L. Rev. at 549):

> "The consequence [of excluding scrupled jurors] is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hard-

> ly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach."

Oberer's article was based upon a well recognized study in the psychological sciences, Adorno, et al., The Authoritarian Personality (Harper, 1950).

Several empirical studies have now been completed which verify the validity of Professor Oberer's position. In 1964 Dr. W. Cody Wilson, Professor of Educational Psychology at the University of Texas, conducted a survey in which approximately 200 subjects were studied in order to determine whether persons who believe in capital punishment differ from persons with scruples against capital punishment in terms of (a) tendency to find the defendant guilty, (b) confidence in their opinions respecting guilt or innocence, (c) the degree of punishment recommended (excluding the death penalty), (d) bias in favor of the prosecution and against the defense, and (e) bias against insanity as a defense plea. The study was conducted by presenting a series of hypothetical cases to each of the subjects. The subject was then required to vote "innocent" or "guilty" on the basis of the facts presented and, if he voted guilty, to assess the punishment at death or imprisonment for any period of years. In addition, the subject was required to state whether he agreed or disagreed with each of a series of statements designed to test his "prosecution proneness," such as "The District Attorney's interpretations of the facts in a criminal case are usually more reliable than the defense lawyer's," or "If two witnesses gave conflicting testimony in a criminal case, I would believe the witness for the prosecution rather than the wit-

ness for the defense." Each subject was also required to state whether he had conscientious scruples against capital punishment.

The results of Professor Wilson's study demonstrate that jurors who have no scruples against the death penalty have a tendency to favor the prosecution on the issue of innocence or guilt to a greater degree than the community as a whole. For example, among "scrupled" jurors deciding innocence or guilt in 6 hypothetical cases, 21% found the defendant not guilty in 4 or more of the hypotheticals, whereas only 9% of the "non-scrupled" jurors found the defendant not guilty in as many as 4 cases. Conversely, 30% of the non-scrupled jurors found the defendant guilty in 5 or 6 of the 6 cases presented, while only 17% of the scrupled jurors found the defendant guilty in as many as 5 or 6 of the same cases. A significantly disproportionate relationship was also discovered to exist between scrupled and non-scrupled jurors in each of the other areas tested. From the scientific data collected, Dr. Wilson concluded:

> ". . . a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilt, favoring the prosecution in opposition to the defense, being prejudiced against the plea of not guilty by reason of insanity, and assessing a more severe punishment excluding the death penalty." (Appendix 4, p. 65.)

Dr. Faye Goldberg, Assistant Professor of Psychology at Morehouse College, surveyed 200 male and female college students, 100 Negro and 100 white, by asking them to vote guilty or not guilty and assess punishment in 16 hypothetical cases. The Goldberg study again confirmed that persons expressing no scruples against the death penalty were more likely to vote guilty in a given factual

situation than persons expressing such scruples.* (Appendix 4, pp. 66-67.)

Pertinent portions of the studies referred to above are included in Appendix 4 to this brief.

This Court may take judicial notice of these scientific studies, especially since they reflect and confirm the practical experience of judges and lawyers. *Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954). Pursuant to settled mathematical principles, the Court may and should assume that the operation of Section 743 created a prosecution prone jury in petitioner's case. See Finkelstein, "The Application of Statistical Decision Theory To the Jury Discrimination Cases," 80 Harv. L. Rev. 338, 349-373 (1966).

These studies demonstrate through scientific methods what the practicing criminal bar has long known. It is for this reason that prosecutors often "qualify" the jury for the death penalty by excluding for cause those who have scruples, but do not thereafter ask the jury to return the death verdict. The advantage thus achieved is a jury *more likely to convict* than one leavened with those who are in principle opposed to capital punishment.

The "prosecution prone" attitude of non-scrupled jurors differentiates this case from the holding of the Court in *Fay*

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* The Goldberg study also confirms that a higher percentage of Negroes have scruples against the death penalty than non-Negroes. Dr. Goldberg found that 76% of the Negroes expressed scruples while only 47% of the whites expressed such scruples. See Part B(1) above. The Goldberg study also shows that a substantial number (42%) of the persons who expressed scruples against the death penalty nevertheless imposed the death penalty in one or more of the hypothetical cases, thus demonstrating the proposition advanced in Part A above that jurors who express conscientious scruples against the death penalty are not necessarily indicating that they would never assent to capital punishment.

v. *New York,* 332 U.S. 261 (1947), in which the majority said (332 U.S. at 291-2):

> "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it."

In contrast, in the case at bar there was a wide gulf in the differing viewpoints of the veniremen who were excluded for cause and those who remained eligible to serve on petitioner's jury, and the difference was prejudicial to petitioner.

In *Fay,* the majority set forth the principle which controls here (332 U.S. at 285):

> ". . . A state is not required to try all classes of offenses in the same forum. But a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the laws.' . . ."

The irony of this situation is that while purporting to exclude those who cannot be fair on the question of punishment, the state is assured of a jury which is likely to be biased in its favor on the innocence-guilt phase of the trial. This system is constitutionally impermissible.

D.

As A Result of the Operation of Section 743, the Venire From Which Petitioner's Jury Was Selected Was Stripped of Persons With Moderate and Humane Views Toward Punishment, and Was Comprised of Persons Who Were Partial To the Prosecution On the Penalty Phase of the Trial.

At the time petitioner was tried, Illinois law provided that upon finding the defendant guilty of murder, the jury must fix a penalty of (i) imprisonment for any term of 14 years or more, (ii) imprisonment for life, or (iii) death by electrocution. (Ch. 38, § 360, Ill. Rev. Stat. 1959.)

In the *voir dire*, the prosecutor repeatedly emphasized his objective of obtaining a verdict of "death in the chair." In order to escape challenge for cause, the veniremen were required explicitly to assure the prosecutor that they would consider the extreme penalty in the event petitioner was found guilty, and vote to impose that penalty if the evidence warranted. The prosecutor's refrain of "death in the chair" rang out incessantly during the selection of the jury. The venire from which petitioner was forced to select his jury was stripped of every person who expressed even the most modest and theoretical reservations about capital punishment.

In jurisdictions such as Illinois in which death is not a mandatory penalty for murder, a number of courts have upheld the practice of challenging for cause persons having scruples against capital punishment, on the theory that if they are not excluded the state cannot obtain a fair trial on the penalty issue. See Annot., "Beliefs Regarding Capital Punishment As Disqualifying Juror In Capital Case For Cause," 48 A.L.R. 2d 560 (1956). This rationale was adopted by the Supreme Court of Illinois in the case at bar. (36 Ill.2d at 476, 224 N.E.2d at 262.)

This reasoning overlooks the fact that a jury selected from the non-scrupled members of the community is likely to be partial to imposition of severe penalties. The scientists who conducted the studies discussed above have discovered that the persons excluded for cause by reason of their views on the death penalty also hold views toward punishment which are far more moderate and humane than those who have no scruples against infliction of the death penalty; and that quite apart from the tendency of non-scrupled jurors to find the defendant guilty (Part C above) and to impose the death penalty, they tend to impose longer prison sentences under comparable circum-

stances than persons who oppose capital punishment. See Wilson "Belief In Capital Punishment and Jury Performance," Appendix 4, pages 64, 66, and Goldberg "Attitude Toward Capital Punishment and Behavior As A Juror In Simulated Capital Cases," Appendix 4, pages 67-68.

Petitioner was thus deprived of the moderate and humane views toward punishment held by those (fully one-half of the community) who were excluded by reason of their views on capital punishment. In terms of attitudes toward penalties for crimes, the venire was lopsided in favor of the more sanguinary members of the community.

Even if the only issue to be determined by the jury in petitioner's case had been the penalty to be imposed, there was nevertheless no justification for wholesale elimination of prospective jurors for their scruples against capital punishment without any showing that the jurors so excused would refuse to consider all of the possible penalties in accordance with the court's instructions. Since the jury was required to consider a wide range of penalties, it was as unfair to petitioner to eliminate persons who would be reluctant to impose the more severe penalties as it would have been unfair to the state to eliminate all who favored those penalties.

In *Townsend* v. *Burke,* 334 U.S. 736, 740-1 (1948), this Court held that the requirements of the Due Process Clause of the Fourteenth Amendment extend to the penalty fixing stage of state criminal trials as well as to the determination of innocence or guilt. Cf. *In re Oliver,* 333 U.S. 257, 273 (1948); *Frady* v. *United States,* 348 F.2d 84, 98 (D.C. Cir. 1965), cert. denied 382 U.S. 909. The state is not required to have the penalty issue tried by a jury, but if it adopts that procedure, the Fourteenth Amendment requires that the jury which tries that issue be fair and impartial and drawn from a full cross-section of the community.

Last term this Court, specifically noting the critical importance of the sentencing phase of criminal trials, held that the Sixth Amendment right to counsel applies during the sentence-fixing procedure and is enforcible against the states through the Fourteenth Amendment. *Mempa* v. *Rhay,* 389 U.S. 128, 134 (1967).

In the absence of a showing that a particular venireman was, on the one hand, so opposed to capital punishment that he would never consider a death verdict, or, on the other hand, so imbued with the spirit of an "eye for an eye" that he would refuse to consider a penalty less than death if petitioner were found guilty of murder, both those who favored capital punishment and those who opposed it should have been eligible to serve on the jury. Accordingly, even if the issue here were limited to the effect of veniremen's views on the penalty issue, the challenge for cause cannot be sustained without showing that the prospective jurors' scruples would prevent them from considering the death penalty in any case. Through the operation of Section 743, the venire from which petitioner's jury was selected did not represent a fair cross-section of the community on the penalty issue, and was unquestionably biased in favor of the prosecution on that issue, in violation of the petitioner's rights as guaranteed by the jury trial provisions of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

E.

Prior Federal Cases Distinguished.

In *Logan* v. *United States,* 144 U.S. 263 (1892), the defendants were indicted for murder, for which the jury fixed the penalty. (See 144 U.S. 264-5, 276.) The *voir dire* questions which served as the basis for the government's challenge for cause were quite similar to those asked in

the case at bar. (See 144 U.S. at 270.) However, no argument was made that exclusion of scrupled jurors violated the defendants' constitutional rights; the defendants argued that it was reversible error to exclude them. The Court *assumed* that a juror's conscientious scruples against infliction of the death penalty would "prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence . . ." (144 U.S. at 298.) This is analogous to the assumption of "implied bias" which the Court indulged as to the government employees in *Crawford* v. *United States,* 212 U.S. 183, 192-6 (1909), which was seriously undermined if not overruled in 1936 in *United States* v. *Wood,* 299 U.S. 123, 139-141 (1936), discussed above at page 15.

The two cases relied on in *Logan* are distinguishable. In *United States* v. *Cornell,* 25 Fed. Cases 650, 655-6 (No. 14,868) (C.C.R.I., 1820), death was the mandatory penalty for the crime involved. Two veniremen who were members of the Quaker faith "excepted to themselves as disqualified, because they were conscientiously scrupulous of taking away life, and did not think themselves impartial in a capital cause . . . " Likewise, in *United States* v. *Wilson,* 28 Fed. Cases 699, 701 (No. 16,730) (C.C.Pa. 1830), the death penalty was mandatory, and the venireman in question stated that "he had conscientious scruples against giving a verdict which in its consequences might be the means of taking away the life of the prisoners . . . "

Several cases decided by Courts of Appeals are likewise distinguishable. In *United States* v. *Puff,* 211 F.2d 171, 180 (2d Cir. 1954) cert. denied 347 U.S. 963, and *Pope* v. *United States,* 372 F.2d 710, 724 (8th Cir. 1967), the prospective jurors were expressly asked whether their scruples against capital punishment would have an effect on their verdict. In *Gillars* v. *United States,* 182 F. 2d 962, 980 (D.C. Cir. 1950), a juror volunteered that her

views concerning capital punishment would prevent her from rendering a fair verdict, whereupon she was excused.

United States ex rel. Dukes v. *Sain*, 297 F.2d 799, 802-803 (7th Cir. 1962), cert. denied 369 U.S. 868, dealt with the Illinois practice here in question.

Where, as here, half of the community is excluded for mere abstract views, with the consequences described above, the result is so patently unfair and unjustified as to infringe upon those basic concepts of justice and fair trial which are inherent in a civilized society and which are guaranteed to all citizens by the Fourteenth Amendment Due Procees Clause itself.

II.

EVEN IF SECTION 743 WERE CONSTRUED TO REQUIRE THE STATE TO ESTABLISH, AS A PREREQUISITE TO EXCLUSION FOR CAUSE, THAT A VENIREMAN'S SCRUPLES AGAINST THE DEATH PENALTY WOULD AFFECT HIS VERDICT ON THE PENALTY ISSUE, THE STATUTE IS NEVERTHELESS INVALID BECAUSE IT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO HAVE THE ISSUE OF HIS INNOCENCE OR GUILT TRIED BY A JURY DRAWN FROM AN IMPARTIAL CROSS SECTION OF THE COMMUNITY.

A.

Petitioner Had a Constitutional Right to Have Persons With Scruples Against the Death Penalty Eligible To Serve On the Jury Which Determined His Innocence Or Guilt.

Even if (contrary to fact) Section 743 were interpreted to exclude only those persons who would refuse to consider or sign a death penalty verdict in any case, the views of those persons would come into play only on the

penalty phase of the case, if that phase were ever reached. The scruples of individual jurors as to the penalty could have no effect on their ability to be fair to the state on the threshold issue of innocence or guilt. The views of the scrupled jurors would tend to balance the views of the non-scrupled jurors who are prone to the prosecution on the innocence-guilt phase of the trial, thus creating a jury which is truly representative of the community as a whole in its attitudes toward both prosecution and defense.* This balancing is envisaged by our laws and required by the Constitution.

As demonstrated in Parts I B and C above, the exclusion of scrupled jurors pursuant to Section 743 deprived the defendant of a jury drawn from a full and fair cross-section of the community and resulted in the selection of a jury which, when compared with the community as a whole, was disproportionately biased in favor of the prosecution on the issue of innocence or guilt. Thus, Section 743 operated to deprive petitioner of his right to trial before an impartial jury drawn from a fair and full cross-section of the community, as guaranteed by the Sixth Amendment and the Fourteenth Amendment Due Process Clause.

Moreover, the operation of Section 743 violated petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment, because it created arbitrary and unreasonable classifications and distinctions among defen-

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* The practice of excluding scrupled jurors originated when the death penalty was mandatory punishment for murder. See, *e.g.*, *United States* v. *Cornell*, 25 Fed. Cases 650 (No. 14,868) (C.C.R.I. 1820). Under those circumstances there may well have been reason to believe that scruples against the penalty might prevent a juror from giving the state a fair trial on the innocence-guilt issue. Illinois repealed the mandatory death penalty in 1867, two years before Section 743 was enacted. (Ill. Laws 1867 at 90.)

dants, to the substantial detriment of those such as petitioner. Defendants indicted for crimes other than murder, and those indicted for murder where the state did not elect to qualify the jury for the death penalty, were afforded juries untainted by the limiting and prejudicial effects of the exclusionary rule. Surely the kind of crime for which a man is indicted, or the whim of the prosecutor as to whether to seek the ultimate penalty, affords no justification for denying a few defendants an impartial, cross-section venire. Cf. *Douglas* v. *California*, 372 U.S. 353, 356-7 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 18-19 (1956); *Fay* v. *New York*, 332 U.S. 261, 285 (1947).

Exclusion for cause of scrupled jurors tainted the fact-finding body at petitioner's trial and deprived petitioner of his constitutional right to have an impartial jury decide his innocence or guilt.

B.

The Double-Issue Trial Procedure Established By the Illinois Legislature Cannot Serve To Justify Violation of Petitioner's Constitutional Right To An Impartial Cross-Section Jury.

Assuming, as we must for the purposes of this case, that the state has the right to impose death as one of the punishments for crime, that right nevertheless cannot and does not transcend petitioner's right to a fair trial under the Constitution on the question of his innocence or guilt. The state may not use its request that the jury impose the death penalty as an excuse for denying petitioner his right to trial on the innocence-guilt issue by an impartial jury selected from a full and fair cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments. The defendant's right to a fair trial on the question of his innocence or guilt far outweighs the state's interest in seeking to persuade the jury to impose any particular penalty in the event the defendant is found guilty.

Violation of petitioner's constitutional rights is the direct result of the double-issue trial system which Illinois created for certain felony cases. Under this procedure, the innocence-guilt issue was tried *at the same time* as the penalty issue. It is this system which created the conflict between petitioner's right to an impartial cross-section jury, and the state's desire to exclude those who would not consider the death penalty. Having established this system, the state may not "bootstrap" by using the existence of the system to force petitioner to trial on the issue of innocence or guilt before a non-representative, prosecution prone jury from which one-half of the community has been excluded solely by reason of their views on the penalty issue. This is particularly true where, as demonstrated above, the exclusion deprived petitioner of a jury composed from a fair cross-section of the racial, social and economic groups which make up the community, and forced him to accept a jury which was partial to the prosecution on the innocence-guilt issue.

Since the state has created the dilemma between petitioner's right to have all impartial persons eligible to serve on the jury on the innocence-guilt issue, and the state's interest in excluding some of those persons as to the penalty phase of the case, the state cannot require petitioner to bear the adverse and unconstitutional effects of the dilemma. Rather, the state must either accept the burdens which arise out of the system it has created, or conform its system to constitutional requirements.

No irreconcible conflict exists between petitioner's right to a fair trial on the innocence-guilt issue, and the state's interest in urging the jury to impose the death penalty. Changes already made in the Illinois Criminal Code have

corrected a part of the problem (see footnote at page 4), and a further alteration in procedure can fully reconcile the competing interests.

The state may avoid the dilemma created by its double-issue procedure by investing the judge with the sentencing function in all cases, without the jury fixing the penalty, or by providing for bifurcated trials.* But so long as

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* Sound independent reasons indicate that the sentencing should be placed in the hands of the judge, who will be fully advised of the pertinent facts and more experienced and capable of determining an appropriate sentence consistent with all of the circumstances, thus advancing the desirable end of establishing logic and consistency in sentences. "At common law the jury returned a verdict of guilty or not guilty, and the punishment was fixed by the court and governed by the laws in force. (2 Blackstone, book 4, 361.)" *George* v. *People*, 167 Ill. 447 (1897) at p. 457.

A number of states already have adopted the bifurcated trial. Cal. Pen. Code § 190.1 (Supp. 1967); Conn. Gen. Stat. Rev. § 53-10 (Supp. 1965); N. Y. Pen. Code § 125.35 (1967); Pa. Stat. Ann. Tit. 18, § 4701 (1963); Tex. Code Crim. P., Art. 37.07 (Supp. 1967). See also "The Two-Trial System In Capital Cases," 39 N.Y. U. L. Rev. 50 (1964).

Indeed, the double-issue procedure may well be constitutionally invalid in and of itself for the reason that it deprived petitioner of an opportunity to introduce evidence in mitigation before sentence was imposed upon him. Under Illinois practice at the time of petitioner's trial, the only defendants who were denied the right of allocution were those indicted for murder and certain other major crimes *who exercised their right to trial by jury*. (Ch. 38, § 801, Ill. Rev. Stat. 1959.) This was (i) an arbitrary and unreasonable classification violative of the Equal Protection Clause, (ii) a penalty imposed upon those who exercise a constitutional right similar to that condemned in *United States* v. *Jackson*, 262 F. Supp. 716 (D. Conn. 1967), now under consideration by this Court as No. 85, and (iii) a violation of the Due Process Clause, which includes the sentencing phase of the trial. *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948).

Illinois retains any vestige of the procedure under which these two issues are tried together by the jury, the Constitution requires the state to forego its challenge for cause of scrupled jurors. The alternative is to callously and unnecessarily sacrifice the defendant's right to a fair trial on the issue of innocence or guilt to the state's increasingly questionable and unpopular interest in obtaining the death penalty. This result, we submit, is contrary to the rights guaranteed by the Sixth Amendment as applied through the Fourteenth Amendment as well as to basic concepts of fairness in the trial of criminal cases.

Conclusion

The decision of the Supreme Court of Illinois should be reversed and this cause remanded with instructions to order petitioner's release unless the State of Illinois affords him a new trial within a reasonable time.

Respectfully submitted,

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